

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 21, 2000

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Labor Ready Mid-Atlantic, Inc. and
Labor Ready, Inc., A single integrated
enterprise and/or Labor Ready,
Mid-Atlantic Inc., successor to
Labor Ready, Inc.
Case 9-CA-37312

This Section 8(a)(1) and (4) case was submitted for advice as to the whether the Employer's federal district court civil action against the Tri-State Building and Construction Trades Council and its affiliated labor organizations (the "Union"), as well as individual defendants, is preempted by the Act and/or is baseless under Bill Johnson's.

The facts are substantially set forth in the Region's submission.¹ Based on that evidence, we conclude that complaint should issue, absent settlement, alleging that Count I of the Employer's lawsuit (damages under Section 303), Count II (tortious interference with business relationships), Count III (tortious interference with business expectancies) and Count IV (unlawful interception of oral communications for a tortious purpose) are baseless and retaliatory within the meaning of Bill Johnson's Restaurants v. NLRB.² In addition, upon issuance of complaint the lawsuit is preempted and its continued maintenance would violate Section 8(a)(1). The Region should dismiss the Section 8(a)(4) allegation, absent withdrawal.

¹ However, subsequent to the Region's submission, evidence was submitted indicating that a neutral employer working at the Chafin site (Phoenix Park) decided to discontinue using Labor Ready in the hope that the picketing would cease. That employer, which itself was the subject of an unfair labor practice charge in Case No. 9-CA-36289, does not assert that the Union threatened it and did not speak with any union representative prior to making its decision to cancel the contract.

² 461 U.S. 731, 743-44, 748-49 (1983).

As a preliminary matter, the Employer argues that this charge is untimely since it was filed nearly a year after the lawsuit was initiated. We conclude that the charges are not barred by Section 10(b) of the Act. The Board has found no Section 10(b) bar where, as here, a lawsuit was filed outside the section 10(b) period but was maintained within that period.³ However, the remedial recovery of attorneys' fees from defending the lawsuit is limited to those costs incurred within the 10(b) period.⁴

The Supreme Court held in Bill Johnson's, supra, that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only if the lawsuit lacks a reasonable basis in fact or law and was commenced with a retaliatory motive. The Court specified that this analysis does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law.⁵ Under San Diego Bldg. Trades Council v. Garmon,⁶ a lawsuit is preempted when the activities at issue in the suit are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. In such circumstances, the court "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."⁷ However, the Court noted that there is no preemption where the activity challenged in another forum either is of merely peripheral concern to the National Labor Relations Act or touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."⁸

³ See Aeronautical Lodge 751 (the Boeing Company), 173 NLRB 450 (1968) (continued prosecution of lawsuit by the filing of several pleadings within the 10(b) period); Professional Assn. of Golf Officials (PGA Tour), 317 NLRB 774 (1995) (Section 10(b) issue was not raised or discussed, but the Board found that the maintenance of a lawsuit that had originated outside the 10(b) period was violative of the Act). See also Beverly Health and Rehabilitation Service, Inc., 6-CA-29506, Advice memorandum dated August 14, 1998.

⁴ See, e.g., J.A. Guy, 9-CA-36439, Advice memorandum dated March 24, 1999.

⁵ 461 U.S. at 737 n.5.

⁶ 359 U.S. 236, 244-45 (1959).

⁷ Id. at 245.

⁸ Id. at 243-44 (footnote omitted).

We conclude that the Employer's Section 303 lawsuit is baseless.⁹ Thus, there is no reasonable basis for the allegation that the Union engaged in conduct violative of Section 8(b)(4)(B). The underlying theory of Count I of the Employer's lawsuit against the Union and other defendants is that the Union's picketing at the Chafin Building was for an unlawful secondary object.¹⁰ The evidence does not support that assertion.

First, the evidence does not establish that the picketing violated Moore Dry Dock¹¹ principles regarding common situs picketing. The evidence indicates that the Chafin building was the site of a renovation project at which several companies worked, including Phoenix Park (the

⁹ We agree with the Region that it is appropriate to apply a Bill Johnson's analysis to a Section 303 lawsuit. See Anderson Seafoods, Inc., 21-CA-32250, Advice Memorandum dated September 29, 1998; Jung Brothers Trucking, 13-CA-38004 et al., Advice Memorandum dated May 16, 2000.

¹⁰ With regard to alleged unlawful picketing at the Fesco and GES projects, the Employer's allegations are untimely. Since Section 303 does not contain a statute of limitations, the federal court should apply the most closely analogous state statute of limitations. See DelCostello v. Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983); BE&K Construction Co. v. Will & Grundy Counties Building Trades Council, 156 F.3d 756, 762 (7th Cir. 1998); Prater v. UMW, District 20 and 23, 793 F.2d 1201, 1209-1210 (11th Cir. 1986); Monarch Long Branch v. Soft Drink Workers, Local 812, IBT, 762 F.2d 228, 231 (2d. Cir. 1985). The Employer's Section 303 claim is most closely analogous to its claim under state law of tortious interference with business relationships and business expectancies for which the limitations period is two years. See Garrison v. Herbert J. Thomas Mem. Hospital, 438 S.E. 2d 6, 13 (1993). The picketing at the Fesco and GES projects occurred more than two years prior to the filing of the lawsuit.

¹¹ Sailors Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950). This case holds that common situs picketing is lawful where: a) the picketing is confined to times when the situs of the dispute is located on the secondary employer's premises; b) the picketing occurs when the primary employer is engaged in its normal business at the situs; c) the picketing is limited to places reasonably close to the dispute; and d) the picketing clearly identifies the entity with which the union has the dispute.

real estate developer), Central Van & Storage, Arch Coal, B&L, and Mountaineer Fire Protection. Labor Ready referred temporary employees to Phoenix Park from September 5 through September 24, 1998, and intermittently thereafter until November 16, 1998. The Employer asserts that the Union picketed at times when the primary employer (Labor Ready) was not present at the site. But the Union claims, without contradiction, that in Labor Ready's absence it picketed the site only with signs alleging that Phoenix Park, B&L, and Mountaineer Fire Protection had committed unfair labor practices (as to which the Union had filed charges),¹² or that Phoenix Park did not pay area standards.¹³ The Employer has presented no evidence that the Union carried signs regarding the dispute with Labor Ready on dates when Labor Ready was not present at the site. Rather, the Employer provided witnesses who made general claims that they have seen only Labor Ready signs but could not identify any instances of observing such signs when no Labor Ready employees were present. To the extent that the Employer can show that the Union picketed with Labor Ready signs after Labor Ready lost the contract with Phoenix Park, there is no evidence that the Union was told about the lost contract or that it should have been aware of it, and the same employees who had previously been referred by Labor Ready continued to appear on the site.¹⁴ Accordingly, the picketing itself was lawful primary picketing under Moore Dry Dock.

Moreover, the evidence otherwise fails to establish that the picketing had an unlawful objective of coercing neutral employers to induce them to cease doing business with Labor Ready. With respect to the Union agent's daily logs, upon which the Employer heavily relies, these do not demonstrate any intent to interfere with Labor Ready's business relationships or to enmesh neutrals in the dispute. The logs discuss actions to be taken against Labor Ready in order to put pressure on it with respect to the Union's organizing efforts, and indicate the Union's view that, if the organizing campaign was unsuccessful, another

¹² The Union alleged inter alia that these entities were joint employers with Labor Ready and had engaged in conduct violative of 8(a)(1) and (3).

¹³ The Union claims it changed the signs to area standard signs after learning that the Board would be issuing a merit dismissal on the joint employer charges.

¹⁴ See, e.g., Carpenters Local 345, 183 NLRB 1109 (1970) (picketing deemed lawful where union had not been advised that primary's employees would be absent from common situs during the period of time picketing took place).

"successful conclusion" might be having Labor Ready decide to cease doing construction work in the Huntington area. However, the logs provide no evidence that the Union sought to induce neutral employees to withhold their services or to coerce neutral employers to cease doing business with Labor Ready, or that the Union's primary objective was to put Labor Ready out of business.¹⁵ Therefore, they do not demonstrate an unlawful secondary object within the meaning of Section 8(b)(4)(B).¹⁶

The Employer also claims that the Union's newspaper advertisement demonstrates that its picketing had an unlawful secondary object.¹⁷ In fact, the first part of

¹⁵ While the Employer claims that the primary object of the Union's campaign was to disrupt the Employer's business relations and put it out of business, a similar argument was raised and rejected by Administrative Law Judge Aleman in Case 9-CA-6223 et al. In rejecting the Employer's argument that a Union agent was not a bona fide applicant, the judge noted that:

Contrary to Respondent, I find nothing in the portions of [the agent's] Daily Log cited by the Respondent, or for that matter, elsewhere in the Log, to support Respondent's position that [the agent's] motivation for seeking employment with Labor Ready was to somehow cause harm to or undermine its operations or to suggest that [the agent] had no real interest in working for Respondent. Rather, the remarks are more suggestive of typical organizational campaign rhetoric and strategy, and reflect nothing more than [the agent's] opinion on how the Respondent might react to the Union's campaign. ALJD, p. 9.

¹⁶ Compare General Teamsters Local No. 126 (Ready Mixed Concrete), 200 NLRB 253, 255 (1972), where the Board found that the sole object of the union's picketing and its other conduct was to put the company out of business, and that in view of this admitted object, "it could hardly be said that the 'cease doing business' purpose was merely incidental." The Board found that "the prohibited objective was, rather, the sole, all consuming aim of the picketing," which was undertaken when handbilling itself did not accomplish the goal and which was handled in a manner designed to enmesh the neutrals' employees and their employers.

¹⁷ The advertisement itself was not unlawful because it was privileged "peaceful publicity." See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council, 485 U.S. 568 (1988). Warshawky v. NLRB, 182 F.3d 948 (D.C. Cir.

the ad, which ran on October 2 and 4, advised employees and customers of Labor Ready that the Union was seeking to organize the Employer's employees and discussed the employees' Section 7 rights; the next part addressed only employees of Labor Ready and suggested that they contact the Agency for further information; and the final part of the ad was directed to customers of Labor Ready and warned such employers that they could be subjected to possible unfair labor practice proceedings if they interfered with the rights of Labor Ready employees. None of those statements reflects a secondary object.

Consequently, the Employer's Section 303 lawsuit is baseless because the Union's conduct did not constitute secondary activity.

Counts II and III of the suit, which allege tortious interference with contractual and business relationships and expectancies, arguably are also baseless. Under West Virginia law, this tort requires that the plaintiff must prove: 1) the existence of a contractual or business relationship or expectancy; 2) the intentional act of interference by a party outside that relationship or expectancy; 3) proof that the interference caused the harm sustained; and 4) damages. Torbett v. Wheeling-Dollar Savings & Trust Co., 173 W.Va. 210, 314 S.E. 2d 166 (W.Va. 1983). In Precision Piping v. E.I. du Pont de Nemours, 951 F.2d 613 (4th Cir.), the Court of Appeals further explained that "[d]efendants are not liable for interference . . . if they show . . . their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper."¹⁸

1999), cited by the Employer, is distinguishable. In that case, the handbilling regarding the primary employer's failure to pay area standards was directed at the neutral's employees and in a manner which, taken as a whole, including an actual work stoppage by the neutral's employees following conversations with the union agent, supported an inference that the union had induced or encouraged a secondary strike. In the instant case, there was no evidence connecting the advertisement, which referred only to Labor Ready's employees and customers, to any conduct at the site.

¹⁸ See also Tiernan v. Charleston Area Medical Center, 203 W.Va. 135, 506 S.E. 2d. 578 (1998) (employer did not unlawfully interfere with a former employee's employment when it truthfully advised a prospective employer that the employee had been a union organizer and the prospective employer retracted its offer of employment); Restatement (Second) of Torts, Sec. 771 ("One who intentionally causes a

The Union's conduct here did not "improperly" interfere with Labor Ready's contractual relationships. Thus, the Union had a legitimate interest in influencing Labor Ready's labor relations policies, its picketing truthfully advised that it had a labor dispute with Labor Ready, and the Union was privileged by law to engage in primary picketing at the common situs. Thus, while one employer terminated its contractual relationship with Labor Ready, that appears to have been an incidental effect of lawful primary picketing.¹⁹ As for the Union's picketing directed at the neutral employers, it was directed at those employers based on their conduct and was unrelated to the dispute with Labor Ready. Consequently, any "interference" by the Union in Labor Ready's contractual relationships with other employers was not "improper," and Counts II and III are baseless under state law.²⁰

third person not to enter into a prospective contractual relation with another in order to influence the other's policy in the conduct of his business does not interfere improperly with the other's relation if (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and (b) the desired policy does not unlawfully restrain trade or otherwise violate an established public policy and (c) the means employed are not wrongful."), cited in Torbett, 173 W.Va. at 216.

¹⁹ It has been long recognized that a natural object of primary picketing is to halt work by neutrals, but such conduct is deemed "incidental" provided that the picketing is otherwise lawful. Compare Dover Corp., 211 NLRB 955, 957 (1974), enfd. as modified on other grounds 535 F.2d 1205 (10th Cir. 1976) (although activity caused neutral employees to honor picket line and refuse to pick up or make deliveries at primary's plant, picketing remained lawful) with IBEW Local 441 (Rollins Communication), 222 NLRB 99, 101 (1976), enfd. 569 F.2d 160 (D.C. Cir. 1977) (otherwise primary picketing found unlawful where union, in conversation with neutral employer, conditioned removal of picketing on some action to be taken by the neutral).

²⁰ The Union argues that there could be no tortious interference since there were no existing "contracts" between Labor Ready and Phoenix Park. The Union contends that the relationship was an "at-will" relationship because the services were advertised on an "as-needed basis," and therefore there was no contractual obligation on Phoenix Park to use Labor Ready beyond the date it stopped using Labor Ready. We reject that argument; there was an ongoing

Finally, Count IV is baseless. It alleges that on numerous occasions individual defendants unlawfully intercepted oral communications for the purpose of committing tortious acts. Under federal and West Virginia law,²¹ it is lawful for one party to a communication to tape record the communication "unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state." The thrust of this count is that certain individual defendants surreptitiously taped their conversations with Labor Ready representatives/agents while seeking applications and/or employment, and that such taping was done pursuant to tortious acts. In this regard, the Employer argues that the Union was seeking to "cultivate" unfair labor practice charges, and also that the tape recording was part and parcel of the Union's unlawful conduct alleged as tortious interference with business and an unlawful secondary boycott. While the evidence indicates tape recordings were made, it does not show that such interceptions were pursuant to any tortious conduct. Particularly noting that Labor Ready was the subject of several unfair labor practice charges, including allegations inter alia that it had unlawfully refused to refer union applicants and had denied access to potential applicants, it appears that the recordings were made to obtain evidence to support the Union's claims. Moreover, as discussed above, the Union was not engaged in conduct violative of Section 8(b)(4)(B), but was engaged in protected primary picketing. Since the Employer has not shown that the interceptions were made for the purpose of committing any tortious act, this count is baseless under state law.

Since the Employer's lawsuit is baseless, and it is retaliatory against Section 7 activities,²² Bill Johnson's does not prohibit the Board from attacking it as a violation of the Act.

With regard to the Section 8(a)(4) allegation, although the timing of the lawsuit is suspect, the suit does not

business relationship between the two entities even if referrals were sought on an as-needed basis.

²¹ 18 U.S.C. 2511(2)(d); 62 W.VA. 1D-3(c)(2).

²² A lawsuit aimed at protected activity is by definition "retaliatory" within the meaning of Bill Johnson's. See BE&K Construction, 329 NLRB No. 68 (1999); Petrochem Insulation, Inc., 330 NLRB No. 10 (1999).

directly attack the filing of the charges with the Board; nor does it petition the Court to in any way consider or relitigate the charges upon which the Board or an administrative law judge has already ruled. Thus, there is no basis to conclude that the lawsuit is intended to interfere with the Board's processes or otherwise retaliate against any of the defendants because they pursued the Board's processes. In these circumstances, a Section 8(a)(1) complaint will provide a sufficient remedy for the unlawful maintenance of the lawsuit and the 8(a)(4) charge should be dismissed absent withdrawal.

Accordingly, complaint should issue, absent settlement, alleging that the Employer's lawsuit violates Section 8(a)(1). Moreover, once complaint issues, the lawsuit is preempted under Loehmann's Plaza²³ since we have determined that the conduct attacked in the suit was protected activity.²⁴


B.J.K.

²³ 305 NLRB 663 (1991).

²⁴ [FOIA EXEMPTIONS 2 and 5